In The

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-684

W. J. ESTELLE,

Petitioner,

v.

ROBERT VERNON BRUCE,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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The petitioner, W. J. Estelle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 9, 1976.

OPINION BELOW

Following a fact-finding hearing on November 1, 1974, a written opinion was rendered by Judge Eldon B. Mahon for the United States District Court, Northern District of Texas, and is included as an appendix to this petition. On appeal from the order of Judge Mahon, a written opinion was rendered by Circuit Judge Clark, United States Court of Appeals, Fifth Circuit, and is found at 536 F.2d 1051 (1976).

JURISDICTION

The jurisdiction of this Court is invoked through the provisions of Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an appellate court will be allowed to substitute its judgment as to the quality and credibility of witnesses for that of the trial court as fact-finder under the guise of the "clearly erroneous rule".

2. Whether the overbroad and indistinct concept of the "clearly erroneous rule" the decision below found necessary to justify its position should be narrowed to reasonable and manageable limits.

STATUTES

The primary question revolves around the provisions of Rule 52(a), F.R.C.P.

STATEMENT OF THE CASE

The factual history of this "far from routine" case is set out in some detail in Circuit Judge Clark's opinion in *Bruce v. Estelle*, 536 F.2d 1051 (1976), and does not require restatement.

Essentially, Mr. Bruce murdered his wife in 1964, was adjudged "mentally ill" and committed to Terrell State Hospital in 1965, was released that same year by a bogus psychiatrist, was then indicted for murder by a grand jury and was convicted at trial on an accident defense. He applied for writ of habeas corpus to the Texas Court of Criminal Appeals, was denied relief, appealed to the Federal District Court and was again denied relief. The Fifth Circuit vacated this order and remanded the cause for application to the state convicting court under Article 11.07, Texas Code of Criminal Procedure. The state convicting court "empaneled an

advisory jury and conducted an extensive evidentiary hearing in 1969." 536 F.2d at 1054. This jury made findings adverse to Mr. Bruce and he returned to the Federal courts. After a District Judge affirmed the state court findings the Fifth Circuit reversed and ordered the Federal District Court to conduct a hearing to resolve the following questions:

> 1. Whether a meaningful determination can presently be made as to Mr. Bruce's mental competence to stand trial in 1965, and if so:
>
> 2. Whether, at the time of the trial in 1965, Mr. Bruce had sufficient ability to consult with his lawyer with a reasonable degree of rational understanding; and whether he had a rational as well as a factual understanding of the proceedings against him.

The District Court answered both of the foregoing questions in the affirmative and Mr. Bruce again appealed to the Fifth Circuit. In reversing, Circuit Judge Clark's opinion agreed with Judge Mahon that a retrospective determination of mental competence may be made, but then rejected the Court's factual determination, that Mr. Bruce was competent at his earlier trial, as "clearly erroneous". It is from this application of the "clearly erroneous rule" that this petition arises.

REASONS FOR GRANTING THE WRIT

1. The decision below misapplied the "clearly erroneous rule" in seeking to justify the substitution of its judgment for that of the United States District Judge as trier of fact.

Citing *Drope v. Missouri*, 420 U.S. 162, 174, 95 S.Ct. 896, 905, 43 L.Ed.2d 103 (1975), *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and *United States v. Makris*, 535 F.2d 899, 906 (1976), the decision below accurately found that "Bruce had the burden of proving that he was most probably incompetent at the time of his 1965 trial." The test in determining

whether he fulfilled this burden was whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational as well as a factual understanding of the proceedings against him. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). This standard is not so stringent as to preclude one "suffering from a mental disease which is at the root of antisocial action" from being fully competent to stand trial. *Lee v. Alabama,* 406 F.2d 466 (1969). Once this factual determination is made by a District Court, it is subject to the provisions of Rule 52(a), F.R.C.P. and will not be set aside on appeal unless clearly erroneous. *Lee v. Alabama,* supra, and *Carroll v. Beto,* 446 F.2d 648 (1971).

In light of the depth and quality of Judge Mahon's opinion, it can only be concluded that the decision below defined this "clearly erroneous rule" as: where x number of witnesses testify for party A and y number of witnesses testify for party B, and x is a larger number than y, then party A wins.

In order to fully comprehend this concept it is necessary to first carefully read and consider the opinion of Judge Mahon discussing the extensive psychiatric testimony and making findings of fact concerning disputes in that testimony. (This opinion is attached as an appendix to the petition.) The decision below examines the same testimony and reaches a different conclusion by inserting itself into the role of fact-finder and judging the quality and credibility of witnesses. Petitioner could not hope to do justice to Judge Mahon's opinion by summarizing or attempting to discuss it. Instead, this Court is urged to read it in its entirety in order to fully realize its careful wisdom.

But to go beyond the purely psychiatric testimony, there is also that of Hugh Snodgrass, Mr. Bruce's lawyer at the 1965 trial. Mr. Snodgrass testified, at the 1969 hearing, that it was his belief that

Mr. Bruce was able to assist him in conducting his defense. (1969 Transcript, Pages 125-126). He further testified that he and Mr. Bruce were in continual communication during the cross-examination of witnesses. (1969 Transcript, Page 126). It should be remembered that Mr. Snodgrass was the only witness throughout any of the proceedings over the last ten years who was in close contact with Mr. Bruce during the 1965 trial and who had the best opportunity to observe him. Mr. Snodgrass' testimony is brought into sharper focus by reference to his affidavit which was incorporated in the record of the 1969 hearing and which appears in this record in Volume 4A, Pages 30-31. (The page numbers referred to appear at the lower right-hand corner of the legal size pages attached to the Transcript of the 1969 hearing.) There, Mr. Snodgrass sets out the pre-trial planning of trial strategy between himself, Mr. Bruce, and Mr. Bruce's father:

> ". . . Vernon Bruce, the father of Robert Bruce, agreed with counsel *as did the defendant Robert Bruce as a matter of trial strategy and tactics* that in the event we did plead the defense of accident as contended by the defendant Robert Bruce that we should not plead in the alternative insanity, as such pleas would have been incompatible and inconsistent and at the time of determining this, *we felt that any punishment assessed with inconsistent pleas would probably be increased in the event the jury rejected both."* (emphasis added; R. Volume 4A, Page 30).

This is highly persuasive evidence that Mr. Bruce was rational and able to assist in his defense and in the planning of it.

The record further reflects that, having decided upon the defense of accident, Mr. Bruce proceeded to present such a defense throughout his trial, and all during his extensive testimony he never once wavered from it (1965 Transcript, Pages 46-90). A fair reading of his trial testimony supports the conclusion that he was a man with a rational as well as factual understanding of the proceedings against him. His testimony

upon vigorous cross-examination is particularly illustrative of his understanding of the proceedings. (1965 Transcript, Pages 64-85; 89-90). All throughout cross-examination, Mr. Bruce maintained his defense of accident and did an excellent job of handling the prosecutor's questions, just one example of which is the following colloquy appearing in the 1965 transcript, beginning at Page 73, Line 16 through Page 74, Line 20:

> "Q All right, did you tell the grand jury that you had not bought a gun for several weeks?
>
> A. I told them I hadn't bought a gun.
>
> Q. You told them you didn't buy a gun on December the 16th, didn't you?
>
> A. I don't remember whether I did or not.
>
> Q. Well, is that true or untrue?
>
> A. Seems to me that he worded the question, you bought a gun to kill your wife on December the 12th.
>
> Q. All right, wasn't the question, 'You haven't bought a gun on December the 16th' and your answer, 'No. Sir.' "
>
> A. He said December the 12th, if I remember.
>
> Q. Oh, well, you have got to be real technical. If the question were asked you if you killed her right then, you might say it was a couple of minutes later.
>
> THE COURT: Don't argue with the witness. You have got a right to read the question and the answers if you are using it for the purpose of impeachment.
>
> Q. (continuing) Then, did you say that you had not bought any gun previously for the last few weeks and your answer was, 'No, sir.' "
>
> A. I think so.
>
> Q. All right.
>
> A. I don't know whether he said that or not, you have the testimony there.
>
> Q. All right, I am reading from it then, the question was,

> 'You did not return a gun to a man and tell him that you intended to kill your wife with it.' "
>
> A. That is a double question. I returned a gun but I didn't say anything about killing my wife with it."

The foregoing is simply not the testimony of a man deprived of a rational and factual understanding of the proceedings against him.

The outbursts made by Mr. Bruce at his 1965 trial, upon which Dr. Cannon placed much reliance in reaching her conclusion that he was then incompetent, take on less significance when viewed in the context of the entire trial. Mr. Bruce and Mr. Snodgrass had decided to rely on the defense of accident. Mr. Bruce's daughter was the State's first witness, and began her testimony in an apparently composed manner. (1965 Transcript, Pages 2-4). When she reached the point in her testimony about her mother's threat to have him hospitalized, Mr. Bruce made the following outburst:

> "THE DEFENDANT: Suzie, she never said that.
>
> THE COURT: Sit down and be quiet.
>
> THE DEFENDANT: Why, hells bells, man." (1965 Transcript, Page 5).

His only other outburst was made a few seconds later:

> "THE DEFENDANT: Tell the truth, Suzie." (1965 Transcript, Page 6).

The foregoing comprise all of the outbursts relied on by Dr. Cannon in reaching her conclusion that he was incompetent; there were no others. When admonished by the Judge, Mr. Bruce said:

> "THE DEFENDANT: I'll keep quiet, Your Honor, I promise to do that." (1965 Transcript, Page 6).

He was true to his word, and made no further outbursts. This was ample evidence upon which a fact-finder could conclude that

Mr. Bruce's apparent anguish was, in fact, indicative of a great degree of understanding of what was occurring. This record suggests that he understood that his daughter's testimony, if allowed to continue, was going to leave his defense of accident in a shambles. It is significant to note that, after his outbursts, the child was thereafter unable to testify to anything concerning her mother's death except in monosyllables and nods of her head; she was effectively destroyed as a witness against him. This in itself indicates that Mr. Bruce's outbursts were not the acts of an irrational man, but were calculated and deliberate acts done in furtherance of his accident defense.

Further, it is doubtful that a day goes by without there occurring throughout the country emotion laden trials complete with similar outbursts. If, every time such occurred, the defendant was declared incompetent to stand trial, it would become somewhat difficult to convict any criminal.

There then arises the very important question of the application of the *Dusky* standard to the trial of this particular offense and defense. The offense being murder by shooting, and the defense being accident, the only issue at trial was whether the pulling of the trigger was accidental or intentional. The ability to assist counsel, then, is a much simpler task than that involved in, for instance, a complex embezzlement trial. Mr. Bruce's testimony, taken alone, is sufficient to demonstrate a rational as well as factual understanding of both the proceedings against him and, further, of what was necessary of him in establishing his defense. The statement of Mr. Snodgrass clearly demonstrates not only Mr. Bruce's ability for the requisite consultation but, in fact, the existence of such consultation. The question never answered through ten years of appellate proceedings is what more could Mr. Bruce have done to assist his counsel than he in fact did?

2. The decision below has left jurisprudence with an overbroad and indistinct concept of the "clearly erroneous rule".

Assuming, as apparently the decision below did, that a state "clearly erroneous rule" and the Federal "clearly erroneous rule" are functional equivalents, then the application of the rule in the instant case should be consistent with its application in *Lee v. Alabama,* supra, *Carroll v. Beto,* supra, and *Drope v. Missouri,* supra.

In both *Lee v. Alabama* and *Carroll v. Beto* a specific evidentiary hearing had been held on the issue of competency and the fact-finder's decision was supported by a body of evidence. Thus, the application of the statutory policy of restraint and the appellate decision that the trial court finding was not clearly erroneous.

In *Drope v. Missouri,* there had been no such evidentiary hearing; there was no body of supporting evidence for the fact-finder; and, in fact, "there was no opinion evidence as to petitioner's competence to stand trial." 43 L.Ed.2d at Page 118. Consequently, this Court applied the "rule" and reversed.

As in *Lee v. Alabama* and *Carroll v. Beto,* the instant case has a record of an evidentiary hearing on the specific issue of competence and a large volume of evidence to support the fact-finder's decision. But, instead of applying the same consistent restraint, the decision below insists on availing itself of the "clearly erroneous rule" as though it were a *Drope v. Missouri* no evidence situation.

The result is to throw into confusion any logical attempt at application of the rule and to render meaningless any attempt to define the term or set parameters upon its coverage.

CONCLUSION

Upon direction of the Fifth Circuit, the Federal District Court held an evidentiary hearing on the specific issue of competency. In an attempt to carry his burden, Mr. Bruce presented evidence of his incompetency at the time of his 1965 trial. Petitioner responded with evidence that Mr. Bruce was fully competent to stand trial for the murder of his wife. The Federal District Judge, as fact-finder, arrived at the well-reasoned conclusion that Mr. Bruce had not satisfied his burden and that he was indeed competent under the *Dusky* standard. The Fifth Circuit chose to disagree with the fact-finder and, in so doing, managed to scramble all consistent thought in the application of the "clearly erroneous rule" provision of Rule 52(a), F.R.C.P.

The only means of effectively providing consistency and meaning to this procedural concept is for this Court to grant the instant petition and reinstate the fact-finder's original opinion.

Respectfully submitted,

Original Signed By
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CERTIFICATE OF SERVICE

I, Ronald D. Hinds, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Petition for Writ of Certiorari on counsel for Respondent, by depositing same in the United States Mail, first-class postage prepaid, on this the _____ day of November, 1976, addressed to Morris I. Jamme, James S. Pleasant, 1000 LTV Tower, Dallas, Texas, 75201; Michael Anthony Maness, 5959 West Loop South, Suite 606, Bellaire, Texas, 77401; and Timothy A. Duffy, 2001 Bryan Tower, Dallas, Texas, 75201, as counsel of record for Respondent.

Original Signed By
RONALD D. HINDS

Ronald D. Hinds

In The
UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division
Civil Action No. CA 3-5368-E

ROBERT V. BRUCE
v.
W. J. ESTELLE, Director, TDC

ORDER

Petitioner, Robert Bruce, challenges his conviction for the murder of his wife, alleging his incompetency to stand trial in September 1965. The matter is now before this Court on remand, pursuant to the Fifth Circuit's Order in *Bruce v. Estelle,* 483 F.2d 1031 (5th Cir. 1973). The rather unusual circumstances surrounding this entire matter are more fully developed therein and need not be repeated here. A hearing was held on November 1, 1974, on the two issues before the Court, to wit:

1. Whether a meaningful hearing on the petitioner's mental competency to stand trial in late September 1965 could presently be held by the Court;
2. If such meaningful hearing could in fact be held now, then was petitioner mentally competent under the standards enunciated in *Dusky v. United States,* 362 U.S. 462 (1960) to stand trial in September 1965 for the alleged murder with malice of his wife.

Petitioner, Robert Vernon Bruce, is in the custody of the Respondent pursuant.o the judgment and sentence of Criminal District Court, Dallas County, Texas, in State Cause No. F-1020-H for the offense of murder with malice. He was convicted on his plea of not guilty on September 21, 1965, and formally sentenced

October 28, 1965, to life imprisonment. His conviction was affirmed April 27, 1966. *Bruce v. State*, 402 S.W. 2d 919 (Tex. Crim. App. 1966). Petitioner has exhausted his state remedies on the issues involved here pursuant to Art. 11.07, Tex. Code Crim. Proc. Ann. The state application on these issues was State Writ No. 36-H which was recommended to be denied by the state convicting court and was ultimately denied by the Texas Court of Criminal Appeals without written order January 14, 1971. Appellate No. 1758. Petitioner and his attorneys, including counsel appointed by this Court and other counsel appearing at the petitioner's request, were present with the petitioner as well as counsel for the respondent. Testimony was received from two qualified psychiatrists who had previously submitted written reports of their respective examinations of the petitioner.[1] The entire record of the state court proceedings is before the Court. If a meaningful hearing can be held at this time, the burden is of course, on petitioner to show by clear and convincing evidence that he was incompetent at the time of his 1965 state court trial. *Bruce v. Estelle, supra* at 1043.

Initially, I conclude that a meaningful hearing can be held on the issue of petitioner's mental competency at the time of the 1965 trial. Dr. Grigson's testimony on this point was clear and convincing. Additionally, Dr. Cannon conceded that such a meaningful hearing was possible at this time if medical and lay testimony in the various court records pertaining to petitioner's

[1] *Both psychiatrists were appointed by the Court.* James P. Grigson, M.D., was initially appointed. His report is dated February 5, 1974, and was filed February 14, 1974 (hereinafter "Dr. Grigson's Report"). Subsequently, after petitioner made known his disatisfaction with Dr. Grigson, Mary L. Cannon, M.D., was appointed to further examine petitioner. Her report is dated October 12, 1974 and was filed October 18, 1974 (hereinafter "Dr. Cannon's Report"). The seemingly long period of time between the two examinations resulted in part from petitioner's refusal to be examined by Dr. Cannon. *See* Footnote 3, *infra*.

mental condition at various dates was used in a manner similar to the way physician's records are used in ascertaining a patient's medical and mental condition. If this is done and current mental examinations are conducted, then Dr. Cannon concludes it is possible to render accurate medical opinions. I find that such lay and medical testimony, as well as the entire record in this matter was utilized by both Drs. Cannon and Grigson and that consequently a meaningful hearing is possible at the present time. *McGarrity v. Beto*, 335 F.Supp. 1186, 1194 (S.D. Tex.) aff'd, 452 F.2d 1206 (5th Cir. 1971); *Carroll v. Beto*, 330 F.Supp. 71 (N.D. Tex.) aff'd, 446 F.2d 648 (5th Cir. 1971).[2] In a hearing of this nature, the Court is to ascertain:

> ". . . whether [the accused] has sufficient ability [before and during his trial] to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 462, 4 L.Ed.2d 824, 825 (1960).

Conflicting medical testimony was presented. Dr. Cannon, upon her examination of petitioner and review of the other records available, concluded that petitioner now suffers and did suffer in 1965 from paranoid schizophrenia. At the time of his 1965 trial, Dr. Cannon further concluded that Mr. Bruce's condition was manifest in an exerbated state such as to render him incompetent under the *Dusky* standard. Dr. Grigson, upon his examination of petitioner and a similar review of the records and prior testimony concluded that petitioner does not and did

[2] The records of various physicians, psychiatrists and nonpsychiatrists, psychologists, those from the Texas Department of Corrections, petitioner's medical history in the military, other lay testimony and the records of petitioner's various judicial proceedings were utilized and mentioned by both Drs. Cannon and Grigson in their reports and testimony.

not in 1965 suffer from schizophrenia, but rather he evinced a sociopathic personality.[3]

I felt that these divergent medical views as to petitioner's current and past mental status necessitated a further two pronged inquiry. The first involves resolution of the two diagnoses. If Dr. Grigson's conclusions are accepted, i.e., that petitioner was and is a sociopathic personality, then that finding would support the conclusion that he had the requisite degree of rational understanding during his 1965 trial. The second inquiry is necessary if Dr. Gannon's evaluation of petitioner, i.e., that he suffers and did suffer from paranoid schizophrenia, is accepted. Then the question becomes whether or not petitioner was in an exacerbated state of this condition at the time of his trial so that he lacked the requisite degree of rational understanding. This second inquiry is necessary because of Dr. Cannon's testimony as to the nature of paranoid schizophrenia. Dr. Cannon testified that this condition afflicts individuals in fluctuating degrees over time. The mental disturbance can be in a state of remission wherein a person can be functionally "normal" and possess a rational degree of understanding of his surroundings or it can be exacerbated wherein an individual could be rendered legally incompetent to stand trial.[4]

[3] Dr. Cannon first saw petitioner briefly while in jail but was unable to examine him because he became emotionally distraught. Her subsequent examination was of approximately three hours duration. Dr. Grigson's examination spanned two hours. He had previously examined petitioner for a one hour period in connection with the state habeas hearing in 1969. Correspondence and other portions of the record in this matter show that petitioner's emotional outburst in refusing to see Dr. Cannon in July, 1974 was a rational and not an irrational act.

[4] The question is not whether or not petitioner now suffers from or ever did suffer from mental illness but rather did he possess a significant ability to consult with his trial attorney with a reasonable degree of rational understanding and whether he possessed a rational and factual understanding of the trial proceedings. *Dusky v. United States, supra.* As the Fifth Circuit observed, one can suffer from mental illness which is at the root of any antisocial conduct and yet possess the requisite rational understanding to stand trial. *Lee v. State*, 406 F.2nd paranoid schizophrenia is manifest in varying degrees. *See* footnote 11, infra.

I initially conclude that Dr. Grigson's testimony and evaluation best demonstrates petitioner's mental condition at the time of his 1965 trial. I feel his conclusions are supported by the entire record and find that Dr. Cannon's evaluation and review of petitioner's mental condition obliquely supports his viewpoint.[5]

Dr. Grigson examined petitioner for the purposes of the instant hearing on October 25, 1973. That examination lasted some two hours. Dr. Grigson also had occasion to examine petitioner for about one hour in connection with state proceedings in 1969. As previously noted Dr. Grigson as well as Dr. Cannon, considered other portions of the entire record before this Court and used this material as a basis for his medical conclusions.

I feel that three circumstances brought out in testimony have particular significance in connection with Dr. Grigson's diagnosis and evaluation. *First* is that portion of the record which reflects petitioner's *early difficulty with family and school.* Dr. Grigson described this behavior as "antisocial". He distinguishes early antisocial behavior as being characteristic of a sociopathic personality as opposed to the pre-schizophrenic.[6] Dr. Cannon noted petitioner's early conduct and indicated that such behavior was compatible with both schizophrenia and a sociopathic personality.[7] *Second:* the testimony of both Drs. Grigson and Cannon concerning petitioner's *behavior during his 1965 trial* is of significance. Much was said of outbursts made by petitioner during the trial. Dr. Cannon observes that petitioner was unable to assist his attorney during the trial ". . . at the times when Mr. Bruce made several emotional outbursts . . ."[8] She related these

[5] Dr. Cannon, in her report extensively reviews the same events which Dr. Grigson considered. Testimony reveals that much of this scrutinized behavior is consistent with either schizophrenia or a sociopath.

[6] *Transcript of Proceedings* (hereinafter Transcript), pp. 104-05.

[7] *Transcript*, p. 29.

[8] Dr. Cannon's Report, finding #12.

outbursts as they appeared from the record to the outburst made by petitioner when he refused to see her on her initial attempt to examine him. Even accepting this testimony to mean that petitioner was unable to effectively assist his lawyer in the conduct of the trial during these outbursts, I do not feel that this alone would render petitioner incompetent under the *Dusky* standard.[9] When viewed in context of the trial, the outbursts take on less significance. The record shows that they occurred in part when petitioner's daughter was testifying. Emotional outbreaks during emotion laden portions of a difficult trial are not conclusive of an inability to have rational understanding of the proceedings. In fact one could conclude that Mr. Bruce's anguish was in fact, indicative of a great degree of understanding of what was occurring. As Dr. Grigson pointed out, the outbursts were controlled by petitioner upon adequate admonitions from the trial court, indicating petitioner possessed rational as well as factual understandings of the proceedings.[10] I agree.[11]

Next, I note the question of petitioner's "faking his symptomology. Dr. Grigson testified that petitioner told him during his October 1973 examination that he, Bruce, had "put a story" over on him in the 1969 examination, i.e., that he had been faking.[12] In the state court competency hearing in 1969 Dr. Grigson testified that he felt petitioner was faking his symptoms. Mr. Bruce's admission during his examination for the instant hearing is, I believe, corroborative of Dr. Grigson's testimony in

[9] Dr. Cannon testified that this is true in a medical sense also. *Transcript, p. 67.*

[10] Dr. Grigson's report, finding #7.

[11] Dr. Cannon testified that the different mental states of a schizophrenic (or any individual for that matter), can change quite rapidly. She recounted an example of a schizophrenic whom she observed go from a state of exacerbation to remission within a 30 second span. *Transcript,* p. 60.

[12] *Transcript,* pp. 93, 110-11, 145-47. In the state court competency hearing in 1969 Dr. Grigson testified that he concluded that petitioner was faking his symptoms.

the state proceedings and in this hearing that he was indeed faking.[13]

I find Dr. Grigson's diagnosis to be the proper one for disposition of this matter. His testimony is more cogent when considered with the fact that it is consistent in some measure with Dr. Cannon's evaluation.[14]

The elements of periodic psychiatric incompetence, faking, early difficulties or any other factor are all important considerations useful in reaching an ultimate conclusion but do not taken alone in and of themselves resolve the issue. The record taken as a whole generally exhibits throughout and particularly in petitioner's own testimony, a man (1) aware of his presence in relation to time, place and things; (2) who apprehends the criminal accusation taking place in a formalized proceeding; (3) in which he is obviously aware he is expected to and does assist himself through legal counsel's knowledge of the facts provided to counsel from the accused's memory; and (4) knowing that finally his responsibility will be decided. In the light of these findings, I conclude that petitioner was a sociopathic personality and did not lack the requisite degree of rational understanding of the 1965 proceedings against him; nor did he lack the ability to consult with his lawyer with a reasonable degree of rational understanding. I find that petitioner did have such an

[13] I do not consider faking, alone to be dispositive of whether petitioner has a sociopathic personality or suffers from schizophrenia. *See Transcript,* pp. 54-57. When viewed in the context of all the evidence considered, however, I do find it to be supportive of Dr. Grigson's evaluation. *See,* Dr. Cannon's testimony, *Transcript,* p. 65.

[14] *Transcript,* pp. 29-30.

understanding at the time of his trial and that accordingly his petition should be denied.[15]

Entered this 24th day of July, 1975.

ELDON B. MAHON
United States District Judge

[15] I am unpersuaded that petitioner has met his burden of proof to show that any mental illness he may have been afflicted with in 1965 left him without that degree of rational understanding which must be shown before his conviction would be set aside. I find that the only inference that can be drawn from Dr. Cannon's diagnosis is that petitioner is afflicted with paranoid schizophrenia. Clear and convincing evidence is wanting as to petitioner's lack of rational understanding during the 1965 proceedings or lack of ability to consult with his lawyer at that time. The only probative evidence of petitioner's incompetency is equivocal at best. *See, Transcript,* p. 75 where Dr. Cannon observed that petitioner certainly did understand questions propounded to him and was responsive to those questions. Both Drs. Cannon and Grigson agree that a sociopathic personality is by nature manipulative. *Transcript,* pp. 31, 101, 144-5. I believe that the record affirmatively demonstrates, petitioner's manipulative abilities, from early childhood to the present and such fact is best understood by Dr. Grigson's evaluation and diagnosis.